Supreme Court, U.S.
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No. 96-286

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CITY OF ALBUQUERQUE, and TONI MARTORELLI, in her official capacity as Director of Family and Community Services for the City of Albuquerque, and MARK SANCHEZ, in his official capacity as Deputy Director of Family and Community Service for the City of Albuquerque, and KATHLEEN STARK, in her official capacity as Supervisor, Bear Canyon Senior Center, City of Albuquerque,
Petitioners,

v.

CHURCH ON THE ROCK and PASTOR DON KIMBRO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Keith A. Fournier
John G. Stepanovich
THE AMERICAN CENTER FOR LAW AND JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
(804) 579-2489

Benjamin W. Bull
THE AMERICAN CENTER FOR LAW AND JUSTICE
7819 E. Greenway Road
Suite 6
Scottsdale, Arizona 85260
(602) 596-0821

Jay Alan Sekulow
(Counsel of Record)
James M. Henderson, Sr.
THE AMERICAN CENTER FOR LAW AND JUSTICE
1000 Thomas Jefferson St., N.W., Suite 304
Washington, DC 20007
(202) 337-2273

Paul F. Becht
BECHT LAW FIRM
7410 Montgomery, NE
Albuquerque, NM 87109
(505) 883-7311

Attorneys for Petitioners

28 pp

QUESTION PRESENTED

Whether the First Amendment is violated by a city policy that otherwise permits citizens to engage in expression at Senior Centers about the Bible, Jesus Christ, and related matters, but excludes such speech when it is presented from a religious point of view?

PARTIES

The caption of the case contains the names of all parties. There are no parent companies or nonwholly owned subsidiaries.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

1. The City of Albuquerque enforces the policy at issue as a total ban on all religious expression by private citizens on the premises of government-owned Senior Centers. The policy allows expression at the facilities, including lectures and films presented by private citizens, on any subject matter that is "of

interest to senior citizens," including expression on religion, the Bible, and related matters. Expression on these topics is excluded, however, when it is presented from a religious perspective. While the policy facially bans "sectarian instruction" and "religious worship," in practice, City officials enforce it as a total ban on all religious sentiments. See Pet. App. 78a (policy).

Under the policy, it is permissible for Don Kimbro, a pastor at Church on the Rock and Senior Center member, to show a film and express sentiments on the Bible and Jesus Christ from a secular or skeptical perspective. The City prohibited his showing the film *JESUS*, however, because the film presents Jesus from a religious viewpoint. It is within this context that Kimbro and the Church challenged the policy as unconstitutional viewpoint and content-based discrimination violative of the First Amendment.

2. On March 24, 1994, Kimbro requested permission to show a two-hour film entitled *JESUS* at one of the Centers. He also requested permission to give away large print Bibles to those who attended the film presentation. Aplt. App. at 103.[1] He enclosed a copy of the film with his letter for the City to review. Aplt. App. at 49.

After reviewing the film, the City denied Kimbro's application. The City stated that allowing the *JESUS* film to be shown would violate City policy prohibiting "sectarian instruction" and "religious worship" at the Centers. Aplt. App. at 105. The City was also motivated by its concern that allowing the film to be

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[1]References to the Appellants' Appendix, filed in the United States Court of Appeals for the Tenth Circuit are indicated as "Aplt. App.".

shown would offend some of the Senior Center members.[2] Aplt. App. at 923-24, 927.

On September 27, 1994, Kimbro filed his complaint against the City, challenging the constitutionality of the policy, and seeking injunctive and declaratory relief. Aplt. App. at 1. On October 3, 1994, Kimbro moved for a preliminary injunction against the City on the grounds, *inter alia*, that the policy of excluding all religious expression at the facilities was unconstitutional. The district court heard evidence and argument in support of, and in opposition to, the constitutionality of the policy at hearings on December 5 and 16, 1994. With the consent of the parties, the court converted the proceeding into cross motions for summary judgment. Aplt. App. at 1417-24. At the conclusion of the December 16th hearing, the district court rejected Kimbro's claims and granted complete summary judgment in favor of the City. Pet. App. 15a, 17a.

3. In a unanimous decision, the United States Court of Appeals for the Tenth Circuit reversed. Pet. App. 1a-14a. The Court relied on *Rosenberger v. University of Virginia*, 515 U.S. ___, 115 S.Ct. 2510, 2516 (1995), *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), *Widmar v. Vincent*, 454 U.S. 263 (1981), and other decisions of this Court in a straight forward application of the public forum doctrine. Because the Centers had "been opened to the public for discussive

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[2]This alone renders the City's censorship of the film unconstitutional. Expression may not be restricted by the government on the basis that some may find it offensive, since to do so constitutes unconstitutional content-based regulation. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1989); *Boos v. Barry*, 485 U.S. 312, 321 (1988).

purposes [including] lectures and classes on a broad range of subjects by both members and non-members" alike, the court of appeals held the facilities to be designated public fora. Pet. App. 7a-8a. The court found that the forum was loosely restricted on the basis of age, and that the "subject matter of presentations" was broadly limited to "topics 'of interest to senior citizens'." Pet. App. at 8a. The court found that the City had "opened the doors of its Senior Centers" to presentations about religion and the Bible, and related topics. Pet. App. at 9a. The court found that the film *JESUS* dealt with subject matter that was a permitted topic of presentation at the Centers. Pet. App. at 9a. The court further found that the film was excluded because its perspective "advocat[ed] the adoption of the Christian faith," rather than presenting the topic from a "skeptical" or secular viewpoint. Pet. App. at 9a. The court concluded that the policy was "properly analyzed as a viewpoint-based restriction on speech." Pet. App. at 9a.

The court observed that "[v]iewpoint discrimination is 'an egregious form of content discrimination'" and "subject to strict scrutiny," citing *Rosenberger*, 115 S.Ct. at 2516, *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990), and *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983). Pet. App. at 10a. The court then found that "to survive strict scrutiny, the City's policy must be 'narrowly drawn to effectuate a compelling state interest'," citing *Perry*, 460 U.S. at 46. Pet. App. at 11a.

The court below then rejected the justifications in support of the policy offered by the City. First, the court held that the Establishment Clause did not justify or require the exclusion of the film. Citing *Rosenberger*, 115 S.Ct. at 2520-25, *Lamb's Chapel*, 508 U.S. at 394-95, and *Widmar*, 454 U.S. at 270-75, the court reasoned "that providing equal access to a designated public forum for citizens engaging in religious expression and citizens engaging

in secular expression does not violate the Establishment Clause." Pet. App. at 11a. Therefore, the "restriction [was] not necessary to serve [that] interest." Pet. App. at 11a. Second, the court dealt with the City's argument that the Older Americans Act requires exclusion of "sectarian worship" and "sectarian instruction" as a condition for receiving federal funding. Pet. App. at 12a. The court held that simply because the policy was facially designed to "conform with federal statutory requirements . . . does not shelter it from constitutional scrutiny." Pet. App. at 12a. The court held that compliance with the "act does not justify this viewpoint-based restriction on expression." Pet. App. at 12a. Third, the court rejected the City's justification that the policy was necessary to protect senior citizens "'vulnerable' to 'religious proselytizing and coercion'." Pet. App. at 12a. The court found that senior citizens are not, as a class, in need of "special insulation from invitations to adopt a religious faith," especially when attendance "is purely voluntary." Pet. App. at 13a. Finally, the court rejected the City's argument that *Tilton v. Richardson*, 403 U.S. 672 (1971), supported exclusion of religious expression at the Centers. Pet. App. at 13a. The court stressed that *Tilton* "concerned an Establishment Clause challenge to statutory language similar to that in the Older Americans Act." Pet. App. at 13a. The court observed that *Tilton* was not a "free-speech challenge to the act" and nothing in that case suggested otherwise. Pet. App. at 14a. The court noted that the City's argument under *Tilton* had already been rejected by this Court in *Widmar*, 454 U.S. at 272 n.12. Pet. App. at 14a.

4. On July 1, 1996, the court of appeals denied the City's motion for stay of the mandate pending filing of a petition for writ of certiorari.

5. On July 18, 1996, Justice Breyer likewise denied the City's application to stay the mandate pending the filing and

disposition of a petition for a writ of certiorari.

6. This case does not involve a challenge to the Older Americans Act, 42 U.S.C. § 3027(a)(14)(A)(IV) (1988), nor does it involve a challenge to the ability of the federal government to condition the receipt of federal funds on compliance with the First Amendment's Establishment Clause. Indeed, contrary to the suggestion of the instant petition, such challenges were not raised below, and are not a part of the record of this case. Thus, the purported question presented by Petitioners does not arise from the record or decision below, and is improperly raised before this Court.

7. The City has also misstated the fact record below. The Albuquerque Senior Centers are multipurpose facilities that are open to all members of the public who are 55 years of age or older, and their spouses regardless of age. Aplt. App. at 48, 542, 861-62. Members and nonmembers alike are permitted on the premises to lead classes, give lectures, and exhibit films. Aplt. App. at 887. Nonmembers who teach classes need not be over 55 years of age. Aplt. App. at 887. Pastor Kimbro is over 55 years of age and is a member of the Senior Centers. Aplt. App. at 206, 208. He would be eligible to exhibit a film or lead a class, however, even if he were not a member. Aplt. App. at 887.

The only subject matter or topic limitation for classes, lectures, or films at the Centers is that a topic should be "of interest to senior citizens." Aplt. App. at 863, 885-89. The City allows the presentation of lectures, classes, and films on the topic of religion, the Bible, and even Jesus Christ. Aplt. App. at 337, 662, 837, 839. For instance, the Senior Centers have permitted the following classes and lectures led by private citizens:

- Bible as Literature - "Study the Bible as literature and see video tapes of Holy Lands." Aplt. App. at 337.

- New Testament Bible Study - "This . . . class will cover the Book of Mark. . . . A New Testament, any version, will be needed for the class, although the New American Standard Bible is preferred." Aplt. App. at 662.

- Theosophy - "This is a discussion group that converses on the subject of the philosophy of religions." Aplt. App. at 482.

- Metaphysical Discussion Group - "[O]pen, honest and creative sharing with a special focus on celebrating all the different ways in which we see our world." Aplt. App. at 176.

- Myths and Stories about the Millennium (presents theories and myths from the Bible, and Greeks, and Romans, "surrounding the end of the age")

- How to Die Young at the Oldest Possible Age (teaches elevating self-esteem)

- El Marrano - History of the Crypto-Jew (history of Spanish and Portuguese Jews forced to convert to Christianity)

- The Near Death Experience (discusses how people experiencing near-death have a renewed sense of hope)

- Make Christmas Merry (teaches how to get through the holidays without being "spiritually" and "emotionally" spent)

- Life Counseling (private professional counselor teaches how to "cope")

- Life Review Class (leader discusses "universal life themes for deepening awareness of self")
- Managing the Stress in Your Life
- Healing Thy Self (overcoming guilt and increasing optimism)
- Meditation and Dream Analysis (teaches meditation and dream interpretation)
- Positive Attitude Class ("Reverend Alan R. Stanley" presents class on having positive attitude about life and death)
- Our Primal Feelings: How They Can Help Us to Survive and Flourish in Today's World (learning how to handle stress by focusing on "childhood traumas")
- Psychological Development through Autobiography (teaches how to "review and integrate the experiences of life")
- Holistic Nursing Service (teaches relaxation and guided imagery to prevent "anxiety, spiritual distress")
- Gentle Yoga (teaches managing stress by using mind and body)
- Tai Chi Chih (teaches "stress reduction" and "heightened spiritual awareness")
- Passover Commemoration (presentation commemorating the Passover story)

- Meditation (Listening to Inner Self) (teaches meditation to quiet "anxieties, concerns, worries")
- Bridge
- Ceramics
- China Painting
- Conversational Chinese
- Creative Writing
- Crocheting
- Legal Clinic (private attorney answers questions)
- Lip Reading
- Literary Discussion
- Bingo
- Square Dancing
- Aquatic Aerobics
- Afternoon at the Movies (films are shown)

See Aplt. App. at 334-716 (Senior Center Activity Catalogs). The City permits the exhibition of films by outside nonmembers on a regular basis. Aplt. App. at 449, 452, 527, 863, 907. Also, those who lecture are permitted to distribute literature. Aplt. App. 176, 901.

As noted above, the only relevant topical, content or subject-matter restriction with respect to expression at the Centers is contained in the policy held unconstitutional by the court of appeals.[3] Facially, the City's written policy prohibits "sectarian instruction" and "religious worship." By practice, the City enforces the policy to prohibit the presentation of permitted topics from a "religious" point of view. Aplt. App. at 98, 837-39, 877-83, 900-01, 923-25, 927, 929-30. So, for example, a lecture on the Bible must present it as history or literature, and not as Scripture, Aplt. App. at 837, 839, and a presentation about Jesus must present him strictly as a historical figure, Aplt. App. at 837.

The City enforces its policy against all citizens at the Senior Centers, Aplt. App. at 875, not merely against lecturers or speakers in the presentation rooms:

- Because the City views such explanations as "sectarian instruction," Aplt. App. at 875, the City employees have warned citizens to stop discussing their faith in conversation while on the premises of the Centers. Aplt. App. at 875-77.

- Because the City views such conduct as "religious worship[,]" the City employees have admonished citizens not to say an audible "grace over [a] meal." Aplt. App. at 880.

- The City interprets its policy as a ban on Catholics holding prayer beads and saying audible Rosaries aloud while at the Centers. Aplt. App. at 881.

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[3]There are some restrictions, not at issue in this litigation, on political candidates and on "advertising for profit." Aplt. App. at 125, 140.

- Because the City views such conduct as "religious worship," the City bans citizens from reading the Bible aloud to other persons on the premises. Aplt. App. at 881.

- Although the City does not ban listening to secular music at the Centers, it does ban listening to the "Sermon on the Mount" when the listener's "viewpoint" is religious. Aplt. App. at 930.

The record below amply demonstrates, as these excerpts indicate, that the City interprets and enforces its policy as a total ban on private "religious" expression at the Senior Centers.

ARGUMENT

The court of appeals correctly applied principles that are firmly established by this Court's cases. The decision below does not, as erroneously contended by the City, "raise important questions of federal constitutional law as to the power of Congress to enforce the Establishment Clause as a condition upon the expenditure of federal funds." Pet. at 8. Indeed, this has never been an issue in this case. Further review is, therefore, unwarranted.

The court of appeals decision represents a straight forward application of principles that are well settled under this Court's decisions in *Rosenberger*, 115 S.Ct. 2510, *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. ___, 115 S.Ct. 2440 (1995), *Lamb's Chapel*, 508 U.S. 384, *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990), *Widmar*, 454 U.S. 263, and numerous other cases. The City, however, attempts to manufacture a new issue that was not raised below, and does not, in fact, exist in this case. Further, in attempting to create an

issue for review where there is none, the City has badly misstated the holding and analysis of the decision below.

I. THE CITY RAISES AN ISSUE THAT WAS NOT PRESENTED OR PRESERVED BELOW, AND IS NOT PROPERLY BEFORE THIS COURT. THIS CASE DOES NOT PRESENT AN IMPORTANT AND UNRESOLVED FEDERAL QUESTION.

This case involves a straight forward challenge to a City policy banning the religious expression of all citizens on the premises of Albuquerque Senior Centers. It does not involve a challenge to the federal Older Americans Act. To be sure, in the court below, the City attempted to justify the policy by arguing that the Act required the City to exclude religious speech as a condition on the receipt of federal funding. The Respondents have never contended, however, that the federal government cannot condition the receipt of funding upon compliance with the Establishment Clause. If the Act's prohibition on "sectarian instruction" and "religious worship" is construed as coextensive with the requirements of the Establishment Clause, then it may well pass muster. But such a construction of the City's policy could not save it because the policy restricts expression well beyond the requirements of the Establishment Clause.

A total ban on the religious expression of *citizens* under the policy is neither mandated by the Establishment Clause or tolerated by the Free Speech Clause. There is simply no authority for the proposition that the Establishment Clause requires the censorship of *all* religious expression of citizens at any government facility, let alone Senior Centers. On the contrary, this Court has been quite clear that, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free

Exercise Clauses protect." *Mergens*, 496 U.S. at 250. Similarly see, *Rosenberger*, 115 S.Ct. at 2522; *Pinette*, 115 S.Ct. at 2448.

This Court has also been quite clear that providing private citizens equal access for religious expression in a designated public forum, or even in a nonpublic forum, does not violate the Establishment Clause, as claimed by the City. See *Rosenberger*, 115 S.Ct. at 2521-23; *Lamb's Chapel*, 508 U.S. at 395; *Widmar*, 454 U.S. at 269, 273-75. Contrary to the City's position, the government is not held to endorse under the Establishment Clause whatever speech it permits on a nondiscriminatory basis. *Pinette*, 115 S.Ct. at 2449; *Lamb's Chapel*, 508 U.S. at 394-95; *Mergens*, 496 U.S. at 250; *Widmar*, 454 U.S. at 271-72. Indeed, because Establishment Clause analysis is necessarily fact dependent, this Court has rejected such "rigid, absolutist" calls for bans on all religious expression. *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984); and see *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (Establishment Clause analysis is necessarily fact dependent).

In any event, the City is obligated to comply with the requirements of the Establishment Clause whether it mimics the language in the Older Americans Act in its policy or not. But as discussed above, compliance would not permit the exclusion of all expression of religious perspectives by citizens on the premises of the Senior Centers. The Establishment Clause does not require such stridency and the Free Speech Clause does not permit it. *Rosenberger*, 115 S.Ct. 2510; *Lamb's Chapel*, 508 U.S. 384.

The City's suggestion that the phantom loss of federal funding justifies the total ban on religious speech is not supportable. First, there is nothing in the record to support the City's present contention that compliance with its constitutional obligations, as mandated by the Free Speech Clause and the court of appeals' decision, will result in the loss of federal funding to

which it is otherwise entitled. Second, the notion that the federal government will require the City to continue its unconstitutional policy and disobey the mandate of the court below, as a condition for the receipt of federal funds, is bizarre and constitutionally indefensible. The government cannot condition the receipt of a benefit upon the recipient's infringement of constitutionally protected rights.[4] Indeed, the City seems to argue that it must commit a constitutional wrong to receive federal funding. This turns the guarantees of the Constitution on their head.

The faux issue raised in the Petition -- if it actually exists at all -- is at best a potential dispute between the City and the federal government. In this case, it is no defense to a constitutional violation for one level of government to argue that another level of government may withhold funds from it unless it engages in a constitutional deprivation. The court of appeals correctly analyzed this point.

> The fact that the City's policy is designed to conform with federal statutory requirements, however, does not shelter it from constitutional scrutiny. A city or state's desire for

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[4]See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. ___, 116 S.Ct. 1495, 1513 (1996) ("Even though government is under no obligation to provide . . . a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right"); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech"); similarly see *FCC v. League of Women Voters of California*, 468 U.S. 364, 384-85 (1984); *Abercrombie v. City of Catoosa, Okla.*, 896 F.2d 1228, 1233 (10th Cir. 1990).

> federal funds is not a compelling government interest [that will] justify this viewpoint-based restriction on expression.

Pet. App. at 12a. Finally, whatever can be said of the Older Americas Act, the First Amendment trumps any statute allegedly requiring a city to engage in unconstitutional deprivations of free speech. See U.S. Const., Supremacy Clause, Art. VI cl. 2. See, e.g., *Widmar*, 454 U.S. at 276 (Court rejected the argument that government body may deny equal access in the name of an alleged compelling interest in following a state law mandate for "greater separation of church and state"); *Lamb's Chapel*, 508 U.S. at 386-87 (Court rejected the argument that it was required to adhere to New York's highest appellate court and the opinion of the Attorney General of New York).

II. THE DECISION BELOW COMPORTS WITH THIS COURT'S DECISION IN *TILTON V. RICHARDSON*, AND DOES NOT CONFLICT WITH THAT DECISION.

The City also erroneously argues that the court of appeals decision does not comport with this Court's decision in *Tilton v. Richardson*, 403 U.S. 672 (1971). Pet. at 10-11. The court below properly rejected the City's argument that its policy was justified under *Tilton*:

> *Tilton* . . . primarily concerned an Establishment Clause challenge to statutory language similar to that in the Older Americans Act. . . . In that case, the Court considered a federal grant and loan program for the construction of academic facilities at institutions of higher learning. The terms of the act excluded facilities used for sectarian instruction or religious worship. The Court held, however, that a provision in the act that effectively allowed facilities

> to be converted entirely to religious purposes after twenty years violated the Establishment Clause. [*Tilton*] at 682-84, 91 S.Ct. at 2097-99. *At no point did the Court address any free-speech challenge to the act, and nothing in the opinion implied that its decision upholding the remainder of the act against an Establishment Clause challenge could be extended to protect similar statutory language against a free-speech challenge.*

Pet. App. at 13a-14a (emphasis added). In *Widmar*, this Court considered a similar argument invoking *Tilton* and rejected it.

> [N]othing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others.

Widmar, 454 U.S. at 272 n.12. Thus, the City's argument under *Tilton* is entirely meritless.

III. THE CITY'S BAN ON ALL RELIGIOUS EXPRESSION AT THE SENIOR CENTERS IS VIOLATIVE OF THE FREE SPEECH CLAUSE AND IS NOT REQUIRED BY THE ESTABLISHMENT CLAUSE.

A. Free Speech Clause

The City erroneously argues that the total exclusion of religious expression, in the context of this case, is permissible under the Free Speech Clause and required by the Establishment Clause. Pet. at 20-25. This argument is meritless. Based on the abundant record evidence, the court of appeals held that the

Albuquerque Senior Centers are designated public forums. Pet. App. at 7a-8a. The court below stated, "[d]esignated public forums are those 'created by government designation of a place . . . for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects'." Pet. App. at 7a (quoting this Court's decision in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985)). The City opened a forum for use by speakers on the topics of religion, the Bible, and related topics. Pet. App. at 8a. Pastor Kimbro is within the class of persons eligible to make presentations at the Centers. Most significantly, the subject matter of the film that Pastor Kimbro desired to exhibit is within the topics and subject matter permitted for presentations at the Senior Centers. As the court below found, "[t]he film Jesus dealt with subject matter similar to that which would be included in a class on the Bible as literature." Pet. App. at 9a.

> The City excluded the film, however, because it
>
> > ran afoul of City policy . . . by advocating the adoption of the Christian faith. In contrast, a film about Jesus' life that ended on a skeptical note and urged agnosticism or atheism would not have contravened the City's policy.

Pet. App. at 9a. The court below correctly concluded that the "'prohibited perspective, not the subject matter' triggered the decision to ban the private expression." Pet. App. at 9a (citing *Rosenberger*, 115 S.Ct. at 2517).

The propriety of the decision below rests on the axiom that it is unconstitutional to exclude private speech from a designated public forum because of its viewpoint. *Rosenberger*, 115 S.Ct. at 2516; *Lamb's Chapel*, 508 U.S. at 392-94; *Perry*, 460 U.S. at 46. As the court below stated,

> [a]ny prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint. . . . [A] restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion.

Pet. App. at 9a. With that consideration in mind, the court below correctly concluded that the "City's policy constitutes viewpoint discrimination." Pet. App. at 9a.

This Court in *Rosenberger* bluntly stated "that discriminating against religious speech was discriminating on the basis of viewpoint." 115 S.Ct. at 2518. Moreover, in *Lamb's Chapel*, this Court had no difficulty discerning the viewpoint discrimination embodied in a ban on presenting a religious film series discussing issues for the contemporary American family. 508 U.S. at 392-94. It is simply impossible for the City's policy to pass constitutional muster under *Rosenberger* and *Lamb's Chapel*. Here, as in *Lamb's Chapel*, the "subject matter [of the film] is not one that the [Senior Center] has placed off limits to any and all speakers." *Id.* at 393. As in *Lamb's Chapel*, the "application to exhibit the particular film . . . was [denied because] the presentation would have been from a religious perspective." *Id.* at 393-94. "[D]enial on that basis was plainly invalid." *Id.* at 394.

Even assuming, *arguendo*, that the Senior Centers are nonpublic forums -- as the City contends -- Kimbro must still prevail. In a nonpublic forum, the City's regulation of expression must still be viewpoint neutral. *Lamb's Chapel*, 508 U.S. at 392-93; *Cornelius*, 474 U.S. at 806; *Perry*, 460 U.S. at 46. Thus, assuming for purposes of discussion that the Senior Centers are nonpublic forums, the exclusion of the film because of its religious perspective constitutes unconstitutional viewpoint discrimination.

Id.; and see *Rosenberger*, 115 S.Ct. at 2516 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction").

This Court has flatly rejected the City's suggestion that "proselytizing" is entitled to less than full constitutional protection. *Widmar*, 454 U.S. at 269 n.6; *Heffron v. ISKCON*, 452 U.S. 640 (1988). This Court has also rejected any attempt to carve out categories of religious expression for lesser degrees of First Amendment protection. *Widmar*, 454 U.S. at 269 n.6; and *Rosenberger*, 115 S.Ct. at 2524.

This Court has also rejected the City's argument that the policy is justified because the City bans all "sectarian proselytizing or worship," and has never allowed any religious perspectives on its premises. Pet. at 21. See *Rosenberger*, 115 S.Ct. at 2517 ("It is as objectionable to exclude a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint"); *Lamb's Chapel*, 508 U.S. at 393-94 (total ban on all religious expression constitutes viewpoint discrimination).

B. Establishment Clause

As the court below correctly observed, this Court "has made it abundantly clear that providing equal access to a designated public forum for citizens engaging in religious expression and citizens engaging in secular expression does not violate the Establishment Clause." Pet. App. at 11a (citing *Rosenberger*, 115 S.Ct. at 2520-25; *Lamb's Chapel*, 508 U.S. at 394-96; *Widmar*, 454 U.S. at 270-75). This constitutional axiom holds true even if the forum is characterized as nonpublic. *Lamb's Chapel*, 508 U.S. at 394-96.

The City's argument that the Establishment Clause is implicated because some persons might perceive that the City "sponsors" the "religious" perspective of the film is meritless. Pet. at 21. First, the City has never even suggested that it "sponsors" the viewpoint of all of the classes, lectures, and films that are presented at the facilities. Here, for the first and only time, the City makes this claim. Second, as this Court stated in *Lamb's Chapel*, where a facility has "repeatedly been used by a wide variety of private organizations[,]" there is "no realistic danger that the community could think that the [City] was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." 508 U.S. at 395; similarly see *Rosenberger*, 115 S.Ct. at 2523-24. The government cannot be held to "endorse everything [it] fail[s] to censor." *Mergens*, 496 U.S. at 250; similarly see *Rosenberger*, 115 S.Ct. at 2522. Third, in *Pinette*, 115 S.Ct. at 2446-50, this Court rejected an argument substantially similar to that raised by the City. This Court observed that allowing equal access may result in some persons misperceiving the access as preferential treatment. This does not, however, create an Establishment Clause violation. "Private religious speech cannot be subject to veto by those who see favoritism where there is none." *Id.* at 2449. The City may cure whatever misperception it fears may result from discontinuing its practice of viewpoint discrimination against religion by publishing a disclaimer along with the announcements of events. See, e.g., *Pinette*, 115 S.Ct. at 2450; *Mergens*, 496 U.S. at 251; *Widmar*, 454 U.S. at 274.

The City also cites *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) in support of its Establishment Clause argument. Pet. at 20. The same *Allegheny* argument was raised and rejected in *Pinette*. Unlike the Senior Centers, the staircase in *Allegheny* did not involve a forum where expression routinely occurred. *Allegheny*, 492 U.S. at 600 n.5.

Most significantly, "if the staircase were available to all on the same terms, 'the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche'." *Pinette*, 115 S.Ct. at 2447 (quoting *Allegheny*, 492 U.S. at 599-600). At bottom, *Allegheny* "neither holds nor even remotely assumes that the government's neutral treatment of private religious expression can be unconstitutional." *Id.*

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Keith A. Fournier
John G. Stepanovich
THE AMERICAN CENTER FOR LAW AND JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
(804) 579-2489

Benjamin W. Bull
THE AMERICAN CENTER FOR LAW AND JUSTICE
7819 E. Greenway Road
Suite 6
Scottsdale, Arizona 85260
(602) 596-0821

Jay Alan Sekulow
(Counsel of Record)
James M. Henderson, Sr.
THE AMERICAN CENTER FOR LAW AND JUSTICE
1000 Thomas Jefferson St., N.W., Suite 304
Washington, DC 20007
(202) 337-2273

Paul F. Becht
BECHT LAW FIRM
7410 Montgomery, NE
Albuquerque, NM 87109
(505) 883-7311

Attorneys for Respondents

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